Supreme Court, U.S.
FILED

No. 09-650

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In The

# Supreme Court of the United States

KELMER DA SILVA NEVES,

*Petitioner,*

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the First Circuit erred in its determination that the First Circuit did not have jurisdiction to review a Motion to Reopen which involved an abuse of discretion by the Board of Immigration Appeals and constitutional claim. *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008); *Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005).

## PARTIES TO PROCEEDING

Kelmer da Silva Neves, Petitioner

Eric Holder, U.S. Attorney General, Respondent

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## OPINION AND JUDGMENT BELOW

The Court of Appeals' unpublished order is unofficially reported at *Neves v. Holder*, No. 07-091 (1st Cir. Sept. 8, 2009), and reprinted in the Appendix at 1a-7a.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

INA § 240(c)(7)(B) provides that a Motion to Reopen shall include: "the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."

In relevant part 8 U.S.C. § 1252(a)(2)(D) states that judicial review is permitted for "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." § 1252(a)(2)(B)(ii) does not bar judicial review of discretionary decisions regarding requests to continue or motions to reopen removal proceedings.

The Fifth Amendment to the United States Constitution provides in relevant part that no person shall be deprived of life, liberty, or property, without due process of law."

## STATEMENT OF JURISDICTION

By judgment entered June 4, 2009, the United States Court of Appeals for the First Circuit dismissed Petitioner's petition for review for lack of jurisdiction. By judgment entered September 3, 2009, with Mandate issued on January 17, 2009, the United States Court of Appeals for the First Circuit denied Petitioner's petition for rehearing en banc.

Petitioner thereafter timely filed this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Petitioner was an applicant for asylum withholding of removal, and protection based upon Article 3 of the Convention Against Torture. The Immigration Judge denied the Petitioner's application for relief. Thereafter, the Petitioner filed a timely appeal with the Board of Immigration Appeals (BIA). By order dated December 3, 2003, the BIA affirmed the Immigration Judge's order. On June 30, 2006, Petitioner filed a second motion to reopen based upon ineffective assistance of counsel. On December 14, 2006, the BIA denied this Motion. Petitioner thereafter timely filed a Petition for Review with the United States Court of Appeals for the First Circuit. This petition for review was based on a final agency determination. 8 U.S.C. § 3.1(a)(7). The First Circuit had jurisdiction based upon 8 U.S.C. § 1252(a)(2)(B)(ii).

By judgment entered June 4, 2009, the First Circuit dismissed Petitioner's petition for review for lack of jurisdiction. By judgment entered September 3, 2009, with Mandate issued on September 17, 2009, the First Circuit denied Petitioner's petition for rehearing en banc. Petitioner now timely petitions this Court for review.

## STATEMENT OF FACTS

Petitioner is a native and citizen of Brazil and entered the United States as a B-2 visitor in 1999. Petitioner retained Joarez Reis, who he believed to be an attorney, to represent him in his applications for asylum, withholding of removal, and protection under the Convention against Torture. On November 1, 2000, the Immigration Judge denied these applications for relief. Thereafter, on November 21, 2000, Mr. Reis filed a Notice of Appeal to the BIA on behalf of the Petitioner. However, since Mr. Reis was not a licensed attorney, he put a post office box [rented by Mr. Reis] as the forwarding address and signed the Petitioner's name. A.R. 20.

On September 25, 2001, the Board dismissed the appeal, deeming it abandoned because there was not an address to which the mail could be effectively sent.

While Petitioner's appeal was pending, Mr. Reis fled Massachusetts to avoid criminal prosecution. By the time of the Board's decision, Mr. Reis had been

arrested by the FBI and was later convicted and imprisoned for 54 counts of mail fraud and lying to the government. A.R. 22-29.

In the meantime, in December 2000, the Petitioner retained another attorney, John Dvorak, to file a Labor Certificate under section 245(i). The Petitioner informed Attorney Dvorak of his appeal pending with the BIA. However, he did not file a Notice of Appearance until April 2002. A.R. 31. The Board forwarded a copy of the September 25, 2001 decision. Attorney Dvorak stated that he would file a Motion to Reopen the proceedings. In May 2003, Petitioner went to Attorney Dvorak's office to inquire about the Motion and discovered that nothing had been filed. Thereafter Petitioner discharged Attorney Dvorak. A.R. 33.

Then, Petitioner retained Gary Yerman. In August 2003, Attorney Yerman filed a Motion to Reopen the Petitioner's proceedings. Mr. Yerman's motion was based on the requirements of Matter of Lozada; however, he failed to attach the appropriate documentation in support of the case. Furthermore, Attorney Yerman failed to request the appropriate relief since the Petitioner was eligible for Adjustment of Status under the Section 245(i) and the LIFE Act. A.R. 35. Petitioner frequently contacted Mr. Yerman's office to inquire about the status of the Motion. In June 2006, the Petitioner discovered that the Motion had been denied on December 3, 2003. Petitioner discharged

Attorney Yerman and retained Joseph Rose to file a subsequent Motion to Reopen.

## ARGUMENT OF THE FIRST ISSUE

This Court has jurisdiction to review the denial of a motion to reopen for an abuse of discretion. Here, the findings in this case that the court lacks jurisdiction are contrary to precedent cases in the First and sister circuits.

The BIA's denial of a motion to reopen may be reviewed for an abuse of discretion. *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008); *Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005). The BIA's decision will be upheld "unless the complaining party can show that the BIA committed an error of law or exercised its judgment in an arbitrary, capricious, or irrational way." *Tandayu*, 521 F.3d at 100 (*quoting Raza v. Gonzales*, 484 F.3d 125, 127 (1st Cir. 2007)); *see also Chen*, 415 F.3d at 153 ("An abuse of discretion exists where the BIA misinterprets the law, or acts either arbitrarily or capriciously.") (*quoting Toban v. Ashcroft*, 385 F.3d 40, 45 (1st Cir. 2004)).

The circuit court may review the denial of motions to reopen immigration proceedings for abuse of discretion. *Ali v. Gonzales*, 448 F.3d 515 (2d Cir. 2006); *INS v. Doherty*, 502 U.S. 314, 322-23 (1992). The First Circuit has determined that "Motions to reopen removal proceedings are disfavored because . . . such motions are at odds with 'the compelling

public interests in finality and the expeditious processing of proceedings.'" *Beltre-Veloz v. Mukasey*, 55 F.3d 7, 9 (1st Cir. 2008) (*quoting Guerrero-Santana v. Gonzales*, 499 F.3d 90, 92 (1st Cir. 2007)). However, the First Circuit has determined that it has jurisdiction to review the BIA's decision not to reopen a case for abuse of discretion. *Punzalan v. Holder*, 575 F.3d 107 (1st Cir. 2009). In *Punzalan*, the First Circuit determined that they "do have jurisdiction" to review the case. *Id.*; *Arias-Valencia v. Mukasey*, 529 F.3d 428, 430 (1st Cir. 2008). "Our review is highly deferential, focusing on the rationality of the decision to deny . . . reopening, not on the merits per se, of the underlying claim." *Id.*; *Abdullah v. Gonzales*, 461 F.3d 92, 99 (1st Cir. 2006). The circuit court will set aside the BIA's decision "only where it rests on an error of law or reflects arbitrary or capricious decision making." *Oliveira v. Holder*, 568 F.3d 275, 277 (1st Cir. 2009). Here, the findings in this case that the court lacks jurisdiction are contrary to precedent cases in the First and sister circuits.

A motion to reopen ordinarily must be filed within ninety days of the entry of the final decision in the underlying proceeding. *See* 8 C.F.R. § 1003.2(c)(2). This provision may be subject to equitable tolling provided that the petitioner has "pass[ed] with reasonable diligence through the period [he] seeks to have tolled." *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (*quoting Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)). While ineffective assistance of counsel may, under certain circumstances, provide a

sufficient basis for equitable tolling, "an alien must demonstrate not only that the alien's constitutional right to due process has been violated by the conduct of counsel, but that the alien has exercised due diligence in pursuing the case during the period the alien seeks to toll." *Id.* at 135; *see also Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006) (noting that "no matter how egregious[ ] ineffective counsel's assistance may have been, an alien will not be entitled to equitable tolling unless he can affirmatively demonstrate that he exercised reasonable due diligence during the time period sought to be tolled").

In this case, Petitioner did establish that he acted with "due diligence" in accordance with the standard set forth in precedent case law. *Jobe v. INS*, 212 F.3d 674 (1st Cir. 2001) *rev'd en banc* 238 F.3d 96 (1st Cir. 2001); *Boakia v. Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006). The First Circuit failed to make a determination regarding the abuse of discretion committed by the BIA in its finding that the Petitioner did not act diligently. The Petitioner argues that the BIA erred in its finding:

> The First Circuit has also stressed due diligence in filing the Motion. *Jobe v. INS*, 212 F.3d 674 (1st Cir. 2001). The BIA denied the Petitioner's motion on the basis that the Petitioner did not seek due diligence in reopening his case. AR 2. However, the Petitioner has shown due diligence in reopening his case. The Petitioner was not aware of the denial of relief until years after the deadline had lapsed. The Petitioner discovered that

> his case was denied in June 2006. Upon this discovery, Petitioner promptly filed a Motion to Reopen within one month. In Yerman's response to Petitioner's complaint, he fails to defend or otherwise contradict the Petitioner's claims that he was never notified of the results of his case. As Attorney Yerman is the attorney of record, he is in effect responsible for the actions of his employees. Here, Petitioner's actions are sufficient to show that he acted diligently in retaining new counsel and reopening his case. *See* Petitioner's Brief at 12-13.

In a recent case, it was recognized that sworn affidavits from counsel must be considered evidence by the BIA. *Kulhawik v. Holder*, ___ F.3d ___, No. 08-4582 (2d Cir. July 6, 2009). The BIA erred in this case by stating that the Respondent failed to provide specific evidence to corroborate his assertion of due diligence. The Board failed to give proper weight to the sworn affidavit from Respondent's prior counsel which detailed the actions taken by the Respondent and by his Law Office.

Here, an issue of law is raised in that the Board's findings were arbitrary and capricious in that the Petitioner did not act diligently. Here, this Court has jurisdiction to review this case similar to other cases such as *Dawoud v. Holder*, 561 F.3d 31 (1st Cir. 2009).

Where the Board has exercised its authority in an arbitrary, capricious, or irrational manner, this Court must remand to the Board. *Kichichian v.*

*Mukasey*, 535 F.3d 15, 22 (1st Cir. 2008). The decision by the Board is a reversible error of law. In its analysis of due diligence, this Court must focus on the length of time that an alien failed to inquire into their status and the length of time that an alien failed to act after the alien had knowledge of the attorney's error. *See Beltre-Veloz*, 55 F.3d at 11 (1st Cir. 2008) (lack of due diligence where alien did not inquire into status for eight years despite knowledge of proceedings); *Do Nascimento v. Mukasey*, 549 F.3d 12, 18 (1st Cir. 2008); *see Boakia v. Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006) (lack of due diligence where Petitioner failed to file new motion for six months after hiring new counsel). In this instance, the Board erred in its application of the facts to the law. In *Chedid*, the First Circuit determined that "even assuming equitable tolling were available, we could only reach the merits of ineffective assistance of counsel claim if the Board abused its discretion in finding that he had not exercised the 'due diligence' required by our case law." *Chedid v. Holder*, 573 F.3d 33 (1st Cir. 2009). Here again, the First Circuit determined that it had jurisdiction to review an abuse of discretion by the BIA concerning a "due diligence" claim.

## ARGUMENT OF THE SECOND ISSUE

This Court does have jurisdiction under REAL ID to review constitutional questions, and the Petitioner has raised a constitutional question here. 8 U.S.C. § 1252(a)(2)(D) (2005); REAL ID Act of 2005, Pub. L.

No. 109-13, 119 Stat. 231, 302 (codified in scattered sections of 8 U.S.C. and 49 U.S.C.). Although adjustment under section 245(i) may be categorized as a discretionary benefit, this Court has jurisdiction to review "non-discretionary legal decisions that pertain to statutory eligibility for discretionary relief." *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003); 8 U.S.C. § 1255(i) (2000). In this instance, where the Petitioner has alleged a due process violation, this Court has jurisdiction to review that claim. This Court has jurisdiction to review the argument that Petitioner's counsel was so ineffective that Petitioner was unable to present his adjustment of status application based on his eligibility under section 245(i). *See Do Nascimento*, 549 F.3d at 17.

A number of other courts have carried out a detailed statutory construction analysis of section 1252, and all agree that Congress intended the limiting phrase "judgment regarding the granting of relief" in section 1252(a)(2)(B)(i) to refer only to discretionary *determinations*. 8 U.S.C. § 1252(a)(2)(B) (2005); *see Mendez-Moranchel v. Ashcroft,* 338 F.3d 176 (3d Cir. 2003); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Iddir v. INS*, 301 F.3d 492, 496 (7th Cir. 2002) (jurisdiction where the application was never adjudicated and the agency thus never exercised its discretion); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1142 (9th Cir. 2002); *Gonzalez-Oropeza*, 321 F.3d at 1332 (indicating § 1252(a)(2)(B) is limited to discretionary decisions). The courts carefully considered Congress' use of the term "judgment" in more than a dozen places in the INA and found that it was

used in only two ways: 1) to refer to a formal decision given by a court; or 2) to refer to the exercise of discretion or to a discretionary determination. "From this, the court[s] concluded it was unlikely Congress would intend a third meaning for 'judgment,' applying it to *any decision* involving the exercise of discretion." *Mendez-Moranchel,* 338 F.2d at 178, *discussing Montero-Martinez v. Ashcroft*, 277 F.3d at 1140 (emphasis in original). "Analytically, the decision whether an alien is eligible to be considered for a particular discretionary form of relief is a statutory question separate from the discretionary component of the administrative decision whether to grant relief." *Goncalves v. Reno*, 144 F.3d 110, 125 (1st Cir. 1998).

Furthermore, First Circuit case law specifically holds that the speculative character of discretionary waivers of deportation is not an absolute bar to a due process claim alleging incompetence of counsel, but rather such character bears on the likelihood that counsel's conduct affected the outcome. *Hernandez v. Reno,* 238 F.3d 50, 56 (1st Cir. 2001). In this case, the acts by Petitioner's counsel violated his due process right to present his adjustment of status application and clearly affected the outcome of his case.

## CONCLUSION

Based on the foregoing, Petitioner respectfully asks that this Petition for a Writ of Certiorari be granted and that he be given the relief requested. The First Circuit panel has clearly deviated from the precedent established. It is within the interests of justice that the panel grant certiorari of this case.

Sincerely,

SAHER JOSEPH MACARIUS, ESQ.
*Counsel for Petitioner*
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508-879-4443

**United States Court of Appeals**
**For the First Circuit**

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No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,* ATTORNEY GENERAL,

Respondent.

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ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

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Before
Lynch, *Chief Judge*,
Torruella and Ebel,** *Circuit Judges*.

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Saher Joseph Macarius with whom Audrey Botros and Law Offices of Saher Joseph Macarius were on brief for petitioner.

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* Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

** Of the Tenth Circuit, sitting by designation.

Stacey I. Young, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, with whom Michael F. Hertz, Acting Assistant Attorney General, and J. Max Weintraub, Senior Litigation Counsel, were on brief for respondent.

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June 4, 2009

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***PER CURIAM.*** Petitioner Kelmer Da Silva Neves, a native and citizen of Brazil, petitions for review of the denial by the Board of Immigration Appeals of his second motion to reopen, which the Board denied on December 14, 2006. Neves's first motion to reopen was denied on December 3, 2003 due to his failure to exercise due diligence in seeking reopening of a September 25, 2001 decision by the Board, which dismissed his asylum appeal.

The second motion to reopen, the denial of which is now before us, was filed on June 30, 2006 and was denied by the Board as untimely and numerically barred. *See* 8 U.S.C. § 1229a(c)(7)(A); 8 C.F.R. § 1003.2(c)(2). Neves's second motion sought reopening of the Board's December 3, 2003 decision.

The Board rejected Neves's argument that the time and number limits should be equitably tolled so he could seek adjustment of status under § 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). *See* 8 C.F.R. § 1003.2(c)(2). The Board found that while Neves had substantially complied with the

requirements to show ineffective assistance of counsel under *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), he nonetheless had failed to show that he exercised due diligence in seeking reopening.

We need not and do not decide whether the statutory provision limiting motions to reopen is subject to equitable tolling. Even if it were, the equitable tolling doctrine is unavailable to a party who has failed to exercise due diligence, as the BIA found here. *Boakai v. Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006) ("[I]f the equitable tolling doctrine is available at all, the petitioner must first show that he has acted with due diligence.").

No constitutional claim or issue of law is raised by petitioner as to the Board's finding of lack of diligence, contrary to the assertions in his reply brief.[1] And where the Board has made a factual determination of lack of due diligence not raising an issue of law or a constitutional claim, under the provisions of the REAL ID Act, 8 U.S.C. § 1252(a)(2)(B)(i), (D), we have held we lack jurisdiction to review the Board's decision. *Ouk v. Mukasey*, 551

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[1] Because the BIA denial was based on a lack of diligence, the claim of ineffective assistance of counsel is not before us. Indeed, the BIA found lack of diligence even assuming counsel was ineffective. Further, even if we had jurisdiction, the ineffective assistance claim is waived. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

F.3d 82, 83-84 (1st Cir. 2008); *Fustaguio Do Nascimento v. Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); *see also Boakai*, 447 F.3d at 4.

The Board further declined to exercise its authority to sua sponte reopen. We have no jurisdiction over this latter decision. *Peralta v. Holder*, No. 08-2073, ___ F.3d ___, 2009 WL 1475557, at *6-8 (1st Cir. May 28, 2009); *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999).

The petition is *dismissed* for lack of jurisdiction.

**United States Court of Appeals**
**For the First Circuit**

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No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,[1]
ATTORNEY GENERAL, Respondent.

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**JUDGMENT**

Entered: June 4, 2009

This cause came on to be submitted on a petition for review of an order of the Board of Immigration Appeals.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The petition for review is dismissed for lack of jurisdiction.

By the Court:

/s/ Richard Cushing Donovan, Clerk

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

cc: Ms. Botros, Mr. Macarius, Ms. Bain, Mr. Furlong, Mr. Amaya, Ms. Bing & Ms. Young.

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**U.S. Department of Justice**
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A77 549 308 – Boston Date: DEC 14 2006

In re KELMER DA SILVA NEVES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Joseph Rose, Esquire

ORDER:

PER CURIAM. This case was last before the Board on December 3, 2003, when we denied the respondent's untimely motion to reopen. The respondent's prior motion to reopen was denied because, *inter alia*, the respondent failed to exercise due diligence in seeking reopening of our September 25, 2001 decision dismissing his appeal (BIA Dec. dated 12/3/03). *See Jobe v. INS*, 238 F.3d 96, 98-99 (1st Cir. 2001). On June 30, 2006, the respondent filed his second motion to reopen. The motion is untimely and number-barred. *See* 8 C.F.R. § 1003.2(c)(2). The respondent contends that the time and number limits for filing his motion should be equitably tolled because he received ineffective assistance of counsel. The respondent has substantially complied with the requirements of *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The respondent requests that his proceeding be reopened

and the record remanded so that he may seek adjustment of status under section 245(i) of the immigration and nationality Act, 8 U.S.C. § 1255(i).

The respondent failed to demonstrate, however, that he exercised due diligence in seeking reopening. *See Jobe v. INS*, *supra*. *See also Chen v. Gonzales*, 415 F.3d 151, 154 (1st Cir. 2005). The respondent claims that 3 years after his former attorney, Gary Yerman, filed a motion to reopen he went to Mr. Yerman's office in June 2006 and learned that the motion had been denied during December 2003. The respondent alleges that he had frequently contacted Mr. Yerman's office to inquire about the status of the motion and was advised to be patient. The respondent also included a letter from Mr. Yerman, which states that the employee who allegedly failed to notify him of the denial was fired. The respondent and Mr. Yerman fail, however, to identify the particular employee responsible for notifying the respondent. Further, the respondent has not provided the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office. In short, the respondent has not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence.

Further, we decline to exercise our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (fundamental change in law may warrant *sua sponte* reopening notwithstanding otherwise applicable time and number limitations on motions); *Matter of J-J-*, 21 I&N Dec.

976 (BIA 1997) (Board retains limited discretionary power under the regulations to reopen or reconsider only in exceptional circumstances). Accordingly, the motion is **denied**.

/s/ Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
Boston, Massachusetts

File No.: A 77 549 308 November 1, 2000

In the Matter of

KELMER DA SILVA NEVES, )
)
Respondent )

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act – remained longer than permitted.

APPLICATIONS: Political asylum; withholding of removal; voluntary departure.

ON BEHALF OF RESPONDENT:

David R. Harsch, Esquire
3179 Main Street
P.O. Box 1000
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ON BEHALF OF SERVICE:

Richard D. Neville, Esquire
Assistant District Counsel
JFK Federal Building,
Room 425, Government Center
Boston, MA 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a 24-year-old, single, native and citizen of Brazil. Removal proceedings were instituted against him when the

Immigration and Naturalization Service issued a Notice to Appear on December 2nd, 1999, charging him with being removable from the United States on the basis of the charge set forth above. (Exhibit 1).

The respondent, through counsel, admitted the factual allegations in the Notice to Appear, conceded removability as charged, declined to designate a country for removal purposes if necessary, and sought the opportunity to apply for political asylum, withholding of removal, and voluntary departure in the alternative. (Exhibit 2).

The respondent has submitted an application for political asylum, which will also be considered as a request for withholding of removal. In order to qualify for asylum relief, the respondent must show that he meets the definition of a "refugee" in that he is outside his country of nationality and is unable or unwilling to return or avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

As to the withholding of removal, the burden of proof is on the applicant to establish that his life or freedom would be threatened in the proposed country of deportation. For instance, that is to say that it is more likely than not that he would be persecuted on account of one of the five statutory grounds.

With respect to his application for political asylum, the respondent says in essence that he worked

in Brazil for the state-owned electric company between May of 1997 and February of 1999. The name of the company was the Company of Electricity of Rio de Janeiro. According to the respondent, it was his responsibility to inspect the power meters of commercial establishments in order to determine whether or not electricity was being stolen. He says that after the verification of stolen electricity he would immediately contact the police experts, who would pursue the investigation and make arrests as necessary.

The respondent says that during the course of his employment he had received several threats as a result of his investigations. He says that in or about February of 1999, he was directed to inspect a restaurant and nightclub owned by one Jose Pedro. According to the respondent, he appeared at the restaurant and notified Pedro that he would face criminal charges for the stolen electricity. He says that he was beaten by the owner, as well as the security personnel, at the nightclub/restaurant and told by the owner that he would be killed if he were to report these activities to the police.

The respondent says that thereafter he did indeed report to the police headquarters in the community of Cabo-Frio, as a result of which the police verified the theft of electricity and arrested the owner of the nightclub, as well as the two security personnel who had beaten up the respondent.

The respondent says that shortly after these arrests, he received a[n] anonymous phone calls with death threats indicating that he had made a big mistake in reporting to the police and shortly thereafter, a bomb was thrown at the front door of his parents' home. As a result of this incident, the respondent left his job, and his city, and moved approximately a hundred miles away to Rio de Janeiro to stay with friends. Because he was in fear of his life, he arranged to come to the United States and his parents advised him that there were people who were looking for him.

At the outset, I should [state] that I do not find the respondent to be a credible witness. I do not believe his story with respect to either the death threats received or the bombing incident at his parents' home. The respondent testified in a very hesitant way about these incidents and it was clear to me that someone who had been employed for a period of two years as an investigator would certainly spend more effort in working with the police in order to apprehend the alleged perpetrators. His statement that the police did not make any arrests because they could not find any evidence and that no one was present at the time does not make any sense to me. Something this critical and such a dangerous action to be taken against a worker, who was employed by the state, would certainly threaten the very existence of the ability of the state to work. It would seem to me that this would be a very high priority item for the police and the electric company, who would have gone

out of their way to apprehend the perpetrators or at least to investigate the case. The respondent's statement that the police told him to leave town or leave the country is not at all plausible. His statement that the electric company only cared about their lost money is also not plausible. Certainly, the electric company could not be seen as a company who would allow their employees' homes to be bombed and to do nothing about it.

Moreover, even if everything the respondent testified to is be believed there is insufficient evidence to show that he has a well-founded fear of persecution or that his life or freedom would be threatened. He has failed to support his claim by testimony which was plausible, detailed and coherent and the record contains merely the respondent's own unsubstantiated and conclusional statements in support of his persecution claim. The respondent worked for the government of Brazil. Clearly, he does not fear any harm from the government. The respondent's job was in the nature of a police officer, an arm of the state, and as such it is to [be] anticipated and the respondent [did] anticipated that threats would arise because of the nature of his job. Any possible retaliation taken against him would have had to be anticipated and would amount to no more than a personal grudge or a criminal action against the respondent. There would not have been any purpose for an alleged criminal, who was stealing electricity, to try to harm the respondent or others like him on account of one of the five statutory grounds.

As I have indicated above, it would seem to me that this sort of retaliation against a government worker would be at the highest priority to the government of Brazil and that no means would be overlooked in order to bring the perpetrators to justice. Clearly, allowing threats like this to go unresponded to would harm the electric company down the line in that the other investigators would become aware of what was happening and, if they knew that the electric company would not back them up, so-to-speak, then they would not pursue their jobs the way they should.

That is why I do not believe the circumstances as related by the respondent and, once again, even if I did the circumstances would not rise to the level as qualifying for political asylum or withholding of removal.

The respondent is ineligible to be granted voluntary departure in that he was not physically present in the United States for a period of at least one year immediately preceding the date the Notice to Appear was served under Section 239(a) of the Immigration and Nationality Act.

Accordingly then and for the reasons set forth above, the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that the application for political asylum be denied.

IT IS FURTHER ORDERED that the application for withholding of removal be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Brazil on the basis of the charge contained in the Notice to Appear.

/s/ Leonard I. Shapiro
LEONARD I. SHAPIRO
U.S. Immigration Judge

**United States Court of Appeals**
**For the First Circuit**

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No. 07-1091

KELMER DA SILVA NEVES

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General

Respondent

---

Before

Lynch, *Chief Judge,* Torruella, Ebel,*
Boudin, Lipez and Howard, *Circuit Judges.*

---

ORDER OF COURT

Entered: **September 3, 2009**

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered

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* Of the Tenth Circuit, sitting by designation.

that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
/s/ Richard Cushing Donovan, Clerk

cc:
John G. Amaya
Quynh Vu Bain
LaTia N. Bing
Kelmer Da Silva Neves
Saher Joseph Macarius
Stacey I. Young

No. 09-650

# In the Supreme Court of the United States

KELMER DA SILVA NEVES, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner did not exercise due diligence in moving to reopen his removal proceedings to apply for adjustment of status under 8 U.S.C. 1255(i).

2. Whether the court of appeals correctly determined that it lacked jurisdiction to review the Board's decision not to exercise its authority to reopen petitioner's removal proceedings *sua sponte*.

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# In the Supreme Court of the United States

No. 09-650

KELMER DA SILVA NEVES, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 568 F.3d 41. The opinions of the Board of Immigration Appeals (Pet. App. 7-9) and the immigration judge (Pet. App. 10-16) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. A petition for rehearing was denied on September 3, 2009 (Pet. App. 17-18). The petition for a writ of certiorari was filed on December 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

b. Section 245 of the INA, 8 U.S.C. 1255, provides that the Attorney General and the Secretary of Homeland Security may, in their discretion, adjust the status

of an alien inspected and admitted into the United States to that of a lawful permanent resident. Several prerequisities must be met, including that the alien must be "eligible to receive an immigrant visa" and "admissible to the United States for permanent residence," and that "an immigrant visa [must be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(2) and (3), 1255(i)(2)(A) and (B).

Even if all of the statutory prerequisities are met, adjustment of status is not automatic. "The grant of an application for adjustment of status under section 245 is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). See also, *e.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978) (Adjustment of status is "a matter of grace, not right."). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

2. An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23 (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary

material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).

An alien is entitled to file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). Those limitations do not apply, however, if the motion to reopen adequately shows that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or in the country to which removal has been ordered" since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), 1003.23(b)(4).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If an alien does not file his motion to reopen within the 90-day time period, the IJ or the Board still may reopen his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). Whether to reopen a case

*sua sponte* is entrusted to the discretion of the Board. 8 C.F.R. 1003.2(a). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

3. Petitioner is a native and citizen of Brazil. Pet. App. 2. The former Immigration and Naturalization Service charged him with being removable as an alien who remained in the United States beyond the time permitted. *Id.* at 10-11; see 8 U.S.C. 1227(a)(1)(B). Petitioner conceded that he is removable as charged but sought asylum, withholding of removal, and voluntary departure. Pet. App. 11.

After a hearing, an IJ found petitioner removable as charged and denied his applications for asylum, withholding of removal, and voluntary departure. Pet. App. 10-16. Petitioner had contended that he would be subject to persecution in Brazil because he was threatened and beaten by a nightclub owner when he worked as an investigator for the state-owned electric company. *Id.* at 12. Petitioner testified that he reported the threats and beating to the police, the police arrested the nightclub owner and his associates, petitioner received further threats, and petitioner then decided to leave Brazil and come to the United States. *Id.* at 12-13. The IJ found that petitioner was not a credible witness based on his demeanor and the implausibility of his story. *Id.* at 13-14. In particular, the IJ determined that petitioner's testimony that the police would not investigate the nightclub owner's threats but instead suggested to

petitioner that he should leave Brazil was "not at all plausible." *Id.* at 13-14.

The IJ further determined that "even if everything [petitioner] testified to is * * * believed," petitioner failed to carry his burden of showing eligibility for asylum or withholding of removal. Pet. App. 14-15. The IJ explained that petitioner "worked for the government of Brazil" and "[c]learly * * * does not fear any harm from the government." *Id.* at 14. The IJ also noted that there was no evidence to suggest that petitioner would be harmed in Brazil "on account of one of the five statutory grounds." *Ibid.* Finally, the IJ denied petitioner's request for voluntary departure because petitioner had not satisfied one of the statutory prerequisites for that privilege (one year of physical presence in the United States). *Id.* at 15.

The Board dismissed petitioner's appeal. Administrative Record 85 (A.R.); see Pet. App. 2. The Board explained that petitioner "appear[ed] to have * * * abandoned" his appeal and that the Clerk's Office's "efforts * * * to reach [petitioner] by mail have been unsuccessful" and that it "lack[s] an address to which mail can effectively be sent." A.R. 85. The Board stated that it would send its decision to petitioner's last known address and that, if petitioner filed a timely motion to reconsider, it would consider reinstating the appeal. *Ibid.* The Board also stated that, "[p]ursuant to the Immigration Judge's order," petitioner would be permitted to voluntarily depart from the United States, but that if he failed to do so within 30 days, he would be rendered ineligible for various forms of discretionary relief, including adjustment of status. *Ibid.*

4. In August 2003, nearly two years after the Board dismissed his appeal, petitioner filed a motion to reopen

his immigration proceedings. A.R. 57-65. He contended that his first attorney had been ineffective by failing to pursue his appeal before the Board and that a second attorney he had secured had been ineffective because that attorney had failed to notify the Board that he was the new counsel of record and had failed to obtain an approved labor certification for petitioner, which would have been a basis for seeking adjustment of status. A.R. 58-63. Petitioner contended that, as a remedy for his attorneys' errors, he should be granted voluntary departure. A.R. 63-64.

The Board denied the motion to reopen. A.R. 51. It explained that the motion to reopen was untimely, because under 8 C.F.R. 1003.2(c)(2), such a motion must be filed within 90 days of the Board's decision. A.R. 51. The Board then determined that petitioner's ineffective assistance of counsel claim did not excuse his untimely filing. *Ibid.* The Board explained that, "[d]espite [the] assertions against two individuals he claims acted as his representatives, [petitioner] appeared pro se on appeal and the record contains no evidence that a representative had any involvement in this case after the removal hearing." *Ibid.* In any event, the Board determined, equitable tolling of the 90-day deadline was not available because petitioner did not exercise due diligence in seeking reopening. *Ibid.* The Board explained that petitioner "admits that he learned of the Board's prior order in August, 2002," yet did not file his motion to reopen until a year later, in August 2003. *Ibid.* Finally, the Board declined to reinstate the voluntary departure order, noting that the IJ had found petitioner ineligible for that privilege and that the Board's prior statement regarding voluntary departure thus had been "made in

error." *Ibid.* Petitioner did not seek further review of that decision by the Board.

5. In June 2006, almost five years after the Board's initial decision, petitioner filed a second motion to reopen proceedings. A.R. 7-17; see Pet. App. 2. Petitioner contended that reopening was justified so that he could seek adjustment of status under 8 U.S.C. 1255(i) based on his assertion that he was the beneficiary of an approved labor certification. A.R. 17. Petitioner argued that the time and numerical limitations for motions to reopen should not bar his motion because his prior attorneys (including his third attorney, who filed the first motion to reopen) had been ineffective, and that his third attorney had failed to advise him that his prior motion to reopen had been denied. A.R. 11, 14-15, 39. Petitioner further alleged that it was not until June 2006 that he learned that the Board had denied his first motion to reopen in December 2003. *Ibid.* In the alternative, petitioner requested that the Board reopen his case *sua sponte*. A.R. 11.

The Board denied petitioner's second motion to reopen. Pet. App. 7-9. The Board observed that petitioner's motion was "untimely and number-barred" under 8 C.F.R. 1003.2(c)(2), and it determined that petitioner failed to show that he exercised due diligence that would justify equitable tolling. Pet. App. 7-8. In particular, the Board noted that although petitioner alleged that he frequently contacted his attorney's office between the time the motion to reopen was filed in 2003 and when he learned of its denial in 2006, he did not "provide[] the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office." *Id.* at 8. The Board also noted that, although petitioner asserted that the employee in

his attorney's office who failed to notify him of the Board's action had been fired, petitioner failed "to identify the particular employee responsible for notifying" him. *Ibid.* Thus, the Board determined, petitioner had "not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence." *Ibid.* Finally, the Board declined to exercise its discretionary authority to reopen petitioner's case on its own motion. *Ibid.*

6. The court of appeals dismissed petitioner's petition for review in a per curiam opinion. Pet. App. 1-4. The court first determined that petitioner's second motion to reopen was both untimely and number barred under 8 U.S.C. 1229a(c)(7) and 8 C.F.R. 1003.2(c)(2). Pet. App. 2. The court then observed that, even if equitable tolling applied to those limitations (a question it did not decide), the Board had determined that tolling was not warranted because petitioner failed to demonstrate due diligence. *Id.* at 3. The court determined that, based on its prior precedents, it lacked jurisdiction to review an alien's challenge to the Board's factual determination that he failed to exercise due diligence, where, as here, the challenge did not raise any constitutional or legal claim. *Id.* at 3-4 (citing *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); and *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006)).[1] The court also held that it lacked jurisdiction to review the Board's decision not to reopen a case on its

[1] The court of appeals did not pass on petitioner's ineffective assistance of counsel claim: it noted that, because the Board's denial of reopening was based on lack of due diligence, that claim was not before the court, and it determined, in any event, that petitioner had waived any such argument. Pet. App. 3 n.1.

own motion. *Id.* at 4 (citing *Peralta* v. *Holder*, 567 F.3d 31 (1st Cir. 2009), and *Luis* v. *INS*, 196 F.3d 36 (1st Cir. 1999)).

## DISCUSSION

Petitioner contends (Pet. 5-11) that the court of appeals erred in holding that it lacked jurisdiction to review the Board's factual determination that he failed to demonstrate due diligence in seeking to reopen his removal proceedings. He also contends (Pet. 5-9) that the Board abused its discretion in declining to reopen his case.

The court of appeals erred in holding that it lacked jurisdiction to review petitioner's claim of due diligence. But the court's ultimate denial of relief was correct because, even if equitable tolling applies to untimely motions to reopen (an issue the court of appeals and Board did not decide), the Board did not abuse its discretion in holding that petitioner failed to demonstrate the due diligence that would be required for equitable tolling. Finally, the court of appeals' determination that it may not review the Board's denial of *sua sponte* reopening is correct and consistent with the unanimous view of the other courts of appeals. Plenary review is therefore unwarranted. However, because the court of appeals erred in holding, at the urging of the government, that it did not have jurisdiction to review the Board's determination that equitable tolling was not warranted, the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration in light of *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), and the position set forth in this brief. In the alternative, the petition for a writ of certiorari should be denied.

1. At issue in this case is the Board's denial of petitioner's second motion to reopen, filed almost five years after the Board's first decision. The relevant statute and regulation clearly provide, however, that a motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. 1003.2(c)(2); see 8 U.S.C. 1229a(c)(7)(C). And an alien is entitled to file only one motion to reopen. 8 U.S.C. 1229a(c)(7)(A); 8 C.F.R. 1003.2(c)(2). The 90-day filing deadline is subject to limited statutory and regulatory exceptions, see 8 U.S.C. 1229a(c)(7)(C)(iv); 8 C.F.R. 1003.2(c)(3), but petitioner does not contend that any of them applies here. Instead, he contends (Pet. 6-7) that the time and numerical limitations are subject to equitable tolling. The Board assumed without deciding that the time and number requirements may be equitably tolled, but determined that the such tolling was not warranted here because petitioner failed to show that he exercised due diligence in presenting his claim to the Board. Pet. App. 7-8.

a. The court of appeals held that it lacked jurisdiction to review petitioner's claim that the Board erred in finding that he had not shown due diligence to excuse compliance with the time and number requirements for motions to reopen contained in 8 U.S.C. 1229a(c)(7) and 8 C.F.R. 1003.2(c)(2). Pet. App. 2-3. That holding was in error. The court's holding was based on three of its prior precedents: *Ouk* v. *Mukasey*, 551 F.3d 82, 83-84 (1st Cir. 2008); *Fustaguio do Nascimento* v. *Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); and *Boakai* v. *Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006). In *Boakai*, the first of those cases, the court of appeals considered whether it had jurisdiction to review the Board's decision not to

grant equitable tolling of the deadline for filing a motion to reopen. 447 F.3d at 1-4. The court held that it lacked jurisdiction, because the petitioner in that case was an aggravated felon, and 8 U.S.C. 1252(a)(2)(C) bars review of "any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. 447 F.3d at 4. The petitioner argued that his equitable tolling claim nonetheless was reviewable under 8 U.S.C. 1252(a)(2)(D) because it raised a "constitutional claim[] or question[] of law," but the court rejected that argument because the "factual determination that [the petitioner] had not exercised due diligence" is a question of fact, not a question of law. 447 F.3d at 4. Thus, the First Circuit did not hold in *Boakai* that it lacked jurisdiction over every claim that the Board erred in finding an alien had not exercised due diligence sufficient to equitably toll the motion-to-reopen deadline. Instead, the court held that it lacked jurisdiction over Boakai's claim because he was an aggravated felon. *Id.* at 3-4.

In *Fustaguio do Nascimento* and *Ouk*, the court of appeals again considered whether it had jurisdiction to review the Board's determination that an alien failed to demonstrate due diligence that would justify equitable tolling of the motion-to-reopen deadline. Neither of those cases, however, concerned an alien who was an aggravated felon. In *Fustagio do Nascimento*, the court remarked in passing that "where the [Board's] decision that equitable tolling is unavailable was based 'on a factual determination that [the petitioner] had not exercised due diligence,' we do not have jurisdiction to review the [Board's] decision." 549 F.3d at 18-19 (second pair of brackets in original) (quoting *Boakai*, 447 F.3d at 4). But the court did not otherwise discuss jurisdiction,

and it went on to uphold the Board's factual determination that the petitioner failed to exercise due diligence. *Id.* at 19. In *Ouk*, the court of appeals again held that it lacked jurisdiction to review "the factual determination that [the alien] had not exercised due diligence, which is a precondition to equitable tolling, if tolling is even available in these circumstances." 551 F.3d at 83. The court cited its decision in *Fustaguio do Nascimento* but did not otherwise discuss why jurisdiction was lacking.

In its brief to the court of appeals, the government argued that the court lacked jurisdiction to review the Board's determination that petitioner failed to show due diligence that would justify equitable tolling, relying on *Bokai* and *Fustaguio do Nascimento*. Gov't C.A. Br. 13-14. The court of appeals agreed. Pet. App. 3-4. The government's submission, and the court's ruling on his point, were in error. Under 8 U.S.C. 1252, an alien may seek judicial review of a final decision by the Board. Section 1252(a)(2) lists several matters that are not subject to judicial review, including certain decisions by immigration officers regarding admissibility, see 8 U.S.C. 1252(a)(2)(A); certain denials of discretionary relief, see 8 U.S.C. 1252(a)(2)(B); and removal orders entered against criminal aliens, see 8 U.S.C. 1252(a)(2)(C). None of those jurisdictional bars applies to petitioner's case. Unlike the petitioner in *Boakai*, petitioner is not an aggravated felon. And the denial of a motion to reopen is not one of the discretionary decisions that is unreviewable under 8 U.S.C. 1252(a)(2)(B). See *Kucana* v. *Holder*, 130 S. Ct. 827, 834-840 (2010). Although petitioner ultimately seeks discretionary relief in the form of adjustment of status, the Board decision at issue is not one "regarding the granting of [that] relief," 8 U.S.C. 1252(a)(2)(B)(i), because the Board did

not decide whether to exercise its discretion to grant petitioner adjustment of status or deny reopening on the ground that the Board would not in any event grant petitioner adjustment of status in the exercise of its discretion. See Pet. 10. Accordingly, none of the jurisdictional bars applies in this case, and there accordingly is no reason to consider (see Pet. 9-11) whether jurisdiction would be restored under the provision permitting review of "constitutional claims or questions of law" under 8 U.S.C. 1252(a)(2)(D).

b. Despite the court of appeals' mistaken jurisdictional holding, the Court may wish to deny the petition for a number of reasons.

First, as petitioner notes (Pet. 6), different panels of the First Circuit have come to different conclusions on this issue, and the court of appeals (rather than this Court) should resolve that confusion. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) (Court does not review intra-circuit conflict). Although the court of appeals determined that it lacked jurisdiction in this case, it has exercised jurisdiction to review a determination regarding whether an alien showed due diligence sufficient to justify equitable tolling in at least four other cases: *Punzalan* v. *Holder*, 575 F.3d 107, 111 n.3 (1st Cir. 2009); *Chedid* v. *Holder*, 573 F.3d 33, 37-38 (1st Cir. 2009); *Beltre-Veloz* v. *Mukasey*, 533 F.3d 7, 11 (1st Cir. 2008); *Guerrero-Santana* v. *Gonzales*, 499 F.3d 90, 93-94 (1st Cir. 2007). Notably, petitioner does not contend that there is any disagreement in the circuits on this question that extends beyond some confusion in the First Circuit. Indeed, after this Court's recent decision in *Kucana*, it is clear that the courts of appeals generally do have jurisdiction to review denials of motions to reopen.

Second, and in any event, the Board did not abuse its discretion in denying petitioner's second motion to reopen. As petitioner acknowledges (Pet. 5), the courts of appeals review denials of motions to reopen under the highly deferential abuse-of-discretion standard, generally upholding the Board's decision "so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible rational approach." *Zhao* v. *Gonzales*, 404 F.3d 295, 304 (5th Cir. 2005) (internal quotation marks omitted). See also *Kucana*, 130 S. Ct. at 834 ("Mindful of the Board's broad discretion in [adjudicating motions to reopen], * * * courts have employed a deferential, abuse-of-discretion standard of review.") (internal quotation marks omitted).

Here, the Board did not abuse its discretion in concluding that petitioner failed to exercise due diligence sufficient to excuse petitioner's failure to comply with the numerical and time limitations on motions to reopen. Both the Board and the court of appeals assumed, but did not decide, that the time and numerical limitations on motions to reopen contained in 8 U.S.C. 1229a(c)(7) may be equitably tolled. Pet. App. 3, 7-8. Assuming *arguendo* that Congress's express limitations on motions to reopen may be equitably tolled upon a showing that an alien exercised due diligence in seeking reopening, petitioner failed to make that showing. As the Board explained, petitioner alleged that after his third attorney filed a motion to reopen in April 2003—a motion that was itself untimely—he regularly stayed in contact with his attorney, and although the motion to reopen was denied in December 2003, he did not learn of it until June 2006. *Id.* at 8. Yet petitioner failed to provide sufficient

detail regarding his contacts with his attorney between 2003 and 2006 to substantiate his claim of diligence, including when he made the contacts, who he spoke with, and what he was told. *Ibid.* Moreover, although petitioner said the error in not notifying him was the fault of one of his attorney's employees, petitioner did not identify that employee or provide other details of the alleged mistake. *Ibid.* In short, after reviewing all of the evidence, the Board concluded that petitioner "has not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence." *Ibid.* The Board did not abuse its discretion in holding that petitioner's unsubstantiated assertions of due diligence did not meet the heavy burden of justifying reopening, especially when petitioner's initial removal order became final five years before he filed his second motion to reopen.[2]

Third, even if petitioner had demonstrated that he received ineffective assistance from his prior attorneys such that equitable tolling was warranted and that he pursued his second motion to reopen with due diligence, the Board could have denied his motion to reopen because petitioner did not demonstrate that he qualified for the underlying relief he seeks—adjustment of status. To qualify for adjustment of status, an applicant is re-

[2] In addition, even assuming that petitioner had established ineffective assistance by his third attorney during the period from April 2003 until June 2006, as alleged in his second motion to reopen, by April 2003 any motion to reopen already would have been time-barred. Although petitioner's second motion to reopen also alleges ineffective assistance by his first two attorneys, petitioner had already made such allegations in his first motion to reopen, which the Board denied, and petitioner did not seek review of the Board's denial in the court of appeals. The Board's rejection of that allegation therefore should be regarding as binding for present purposes.

quired to show that he "is eligible to receive an immigrant visa and is admissible to the United States for permanent residence * * * and * * * an immigrant visa is immediately available to the alien at the time the application is filed." 8 U.S.C. 1255(i)(2). Generally, two governmental approvals are required to make such a showing for an employment-based immigration preference: (1) approval by the Department of Labor of an application for alien labor certification, and (2) approval by the Department of Homeland Security of a visa petition for the benefit of the adjustment applicant who is to fill the position. The issuance of the labor certification establishes that the alien is not inadmissible under 8 U.S.C. 1182(a)(5)(A)(i), which requires an employer of an alien seeking admission to the United States to perform skilled labor to first obtain certification from the Secretary of Labor that there are not sufficient workers to perform the particular labor in the relevant area. The approval of the visa petition with a current priority date, on the other hand, establishes that an immigrant visa is immediately available to the alien. See *United States* v. *Ryan-Webster*, 353 F.3d 353, 355-356 (4th Cir. 2003) (describing process and the significance of each step). Petitioner argued in his second motion to reopen that he was the beneficiary of a labor certification, but he did not argue or include evidence showing that he had ever received an approved visa petition. Petitioner's failure to demonstrate eligibility for the relief he requested thus also would have warranted the denial of his motion to reopen.

2. Assuming that petitioner's motion to reopen was untimely or number-barred and those bars were not subject to equitable tolling, the question becomes whether the court of appeals erred in holding that it lacks ju-

risdiction to review the Board's decision not to reopen the proceedings *sua sponte*. Although petitioner contends generally (Pet. i) that the court of appeals erred in holding that it lacked jurisdiction to review the denial of reopening, he does not argue in particular that the court of appeals erred with respect to *sua sponte* reopening. The court of appeals' decision was correct on that score.

Because petitioner's second motion to reopen was time-and number-barred, the Board considered whether to reopen petitioner's case *sua sponte*. Pet. App. 8-9. The Board declined to exercise its discretion to reopen the case *sua sponte*, *ibid.*, and the court of appeal held that it lacked jurisdiction to review that determination, *id.* at 4. In support of its conclusion that denials of *sua sponte* reopening are unreviewable, the court of appeals cited *Peralta* v. *Holder*, 567 F.3d 31, 34 (1st Cir. 2009), and *Luis* v. *INS*, 196 F.3d 36, 40-41 (1st Cir. 1999), both of which held that the decision whether to reopen removal proceedings *sua sponte* is unreviewable because it is committed to the Board's discretion by law. Under the Administrative Procedure Act, judicial review is not available when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). As the *Luis* court explained, that is true with *sua sponte* reopening because "[t]here are no guidelines or standards which dictate how and when the [Board] should invoke its sua sponte power." 196 F.3d at 40-41; see *Peralta*, 567 F.3d at 34 ("The [Board's] discretion in this regard is unfettered; there are no standards in place by which a court can review the use or non-use of that sua sponte discretion."). Furthermore, unlike the statutory and regulatory provisions allowing an alien to file a motion to reopen, the regulation permitting the Board to reopen a case *sua sponte* establishes a procedural mechanism for

the Board itself in aid of its own internal administration. It does not confer any privately enforceable rights on an alien. Accordingly, the Board's decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law and not reviewable by a court.

The decision below is consistent with the unanimous view of the courts of appeals that a denial of *sua sponte* reopening is not subject to judicial review. See *Peralta*, 567 F.3d at 34 (agreeing with ten other courts of appeals).[3] Petitioner does not contend that there is any disagreement in the circuits on this point. Further review is therefore unwarranted.

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[3] In *Kucana*, which held that 8 U.S.C. 1252(a)(2)(B)(ii) generally does not preclude judicial review of the denial of a motion to reopen, the Court recognized that ten courts of appeals had agreed that denials of *sua sponte* reopening are unreviewable because sua sponte reopening is committed to agency discretion by law. 130 S. Ct. at 839 n.18.

## CONCLUSION

The Court should grant the petition, vacate the decision below, and remand the case to the court of appeals for further consideration in light of *Kucana* v. *Holder*, 130 S. Ct. 827 (2010), and the Solicitor General's views on the first question presented stated herein. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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